Editor's note: Reconsideration denied by Order dated Feb. 12, 1990

RANDALL AND JANET GERLACH

IBLA 87-709 Decided December 13, 1989

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting application for license to mine coal. OR 41596.

Affirmed.

1. Coal Leases and Permits: Permits: Generally

> BLM properly rejects an application for a royalty-free license to mine coal under sec. 8 of the Mineral Leasing Act, 30 U.S.C. § 208 (1982), when the stated use of the coal is to generate electricity for mining purposes.

APPEARANCES: Randall J. Gerlach, Brookings, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Randall and Janet Gerlach have appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated June 16, 1987, rejecting their application for a license to mine coal. BLM took this action because it found that the purpose for which appellants proposed to use the coal was inconsistent with the intent of the applicable statute.

The applicable statute here is section 8 of the Mineral Leasing Act, 30 U.S.C. § 208 (1982). This statute reads:

> In order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this chapter as in his opinion will safeguard the public interests. This privilege shall not extend to any corporations. In the case of municipal corporations the Secretary of the Interior may issue such limited license or permit, * * * the land to be selected within the State wherein the municipal applicant may be located, upon condition that such municipal corporations will mine the coal therein under proper conditions

> and dispose of the same without profit to residents of such municipality for household use: Provided, That the acquisition or holding of a lease * * * shall be no bar to the holding of such tract or operation of such mine under said limited license. [Emphasis supplied.]

The intended use of the coal, as stated by appellants, is "experimental electrical generation for mining processes and processing coal and nickel laterites" (Application and License to Mine Coal, Nov. 26, 1986, at 1).

In their statement of reasons on appeal, appellants contend that their purpose is within the meaning of section 8:

> Our stated purpose "for electrical generation for mining processes and processing coal and nickel laterites" is a strictly local, domestic use as opposed to a foreign, international or export use. In quoting from a Webster's New Collegiate Dictionary, a valid definition of the word domestic is "relating and limited to one's own country or the country under consideration."
>
> We do not intend to sell the coal. We are not a corporation and we do not intend to make a direct profit from the coal.
>
> The end products, when processing laterites, are nickel, cobalt, and chromium and they are for strategic domestic use.

We find no support for appellants' arguments in section 8, its legislative history, Departmental case law, or in the regulations implementing section 8. No definition of the phrase "strictly local domestic needs for fuel" is found in any of these materials. The legislative history is not illuminating, 1/ and case law 2/ has yet to construe this term. The regulations at 43 CFR Subpart 3440, however, offer insight into the meaning of

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1/ The conference report to accompany S. 2775 embodied the final draft of section 8. As enacted, the law restored Senate provisions which permitted "individuals or groups of individuals to secure limited licenses or permits to secure a supply of coal for strictly domestic needs. The House provi-sions confined such licenses and permits to municipal corporations." H.R. Rep. No. 600, 66th Cong., 2d. Sess. 17 (1920).

Senator Reed Smoot of Utah, Chairman of the Subcommittee on Public Lands, introduced S. 2775 on Aug. 19, 1919. In debate on the Senate floor, Senator Smoot stated:

"Again, in the case of an individual who lives 30 or 50 miles from a railroad and knows that immediately adjacent to his home there are millions of tons of coal, do you think that to-day he can take a shovelful of it? If he does, he violates the law. This bill gives him the right without royalty to take enough coal to keep his family warm during the winter."

58 Cong. Rec. 4175 (1919) (emphasis added).

2/ We are aware of only one appeal involving section 8 which has come before the Department, W.T. Morris, 51 L.D. 416 (1926). In Morris, First

this phrase and support BLM's reading of the statute. Although a definition of this key term is lacking, it is clear that the distinction urged by appellants, i.e., the distinction between foreign and domestic use, is not found in the aforementioned materials.

[1] The preamble to the regulations at 43 CFR Part 3440 links the phrase "domestic use" with household uses. Thus, in response to comments calling for a definition of "domestic use," the Department responded: "The definition has not been added to the final rulemaking, but in common usage, domestic use embraces burning coal in a fireplace, boiler or elsewhere in a house. Section 3440.1-3 [3/] contains what amounts to a definition by prohibiting nonhousehold uses." 44 FR 42584, 42601 (July 19, 1979) (emphasis added).

Common law definitions of the word "domestic" support the meaning offered by the preamble. Thus, in Kimball v. Northeast Water Co., 107 Me. 467, 78 A. 865 (1911), "domestic" is said to be derived from domus, meaning a house. "Domestic" is therein defined as "belonging to the home or household, concerning or relating to the home or family." Acknowledging that the term has a widely varying meaning, Kimball states that it relates primarily to the house or home, and its significance must be determined with reference to the subject matter and the relation in which it appears.

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fn. 2 (continued)
Assistant Secretary Finney reversed a decision of the Commissioner, General Land Office, which denied a section 8 license to an applicant intending to use the coal as fuel for drilling a deep test well for oil and gas. The applicant (Morris) was the assignee of an oil and gas prospecting permit.

Assistant Secretary Finney pointed out that the Act of Feb. 25, 1920, and the regulations thereunder, permitted the use, without charge, of fuel oil by permittees and lessees in drilling operations. He concluded that a permittee under this Act was an agent of the United States for certain purposes. 51 L.D. at 417. Acknowledging that Congress had not specifically authorized the granting of licenses to mine coal under the circumstances disclosed, Finney held that Morris could be granted a license to mine and take coal from the public lands without payment of royalty for his use as an agent of the United States in prospecting for oil and gas, but not for sale.

Without reviewing the legal analysis in Morris, we note that the instant case is distinguishable by the facts. The record does not disclose that appellants hold other leases or permits which might qualify them as agents of the United States under Morris.

3/ That provision, captioned "Limitations on coal use," provides:

"[a] A license to mine may be issued to a municipality for the non-profit mining and disposal of coal to its residents for household use only. Under such a license, a municipality may not mine coal either for its own use or for nonhousehold use such as for factories, stores, other business establishments and heating and lighting plants.

"[b] Coal extracted under a license to mine shall not be disposed of for profit."

Again, in Henderson v. Shreveport Gas, Electric Light & Power Co., 134 La. 39, 63 So. 616 (1913), "domestic" is defined to mean "of or per-taining to one's house or home, or one's household or family * * * [and] therefore excludes the idea of business; unless one pursues his vocation or calling within his home."

Henderson appears to be consistent with the definition employed by the Department in former regulations issued just months after enactment of section 8:

> Under section 8 of the act, the Secretary of the Interior is authorized to issue limited licenses to individuals and associations of individuals to mine and take coal for their own use, but not for sale, without the payment of any rent or royalty, and such licenses may be issued to municipalities to mine and dispose of coal without profit to their residents "for household use." Attention is called to the fact that, under this section, an individual or association of individuals may mine and take coal under such a license for his or their own strictly local domestic needs for fuel, whatever such use may be, but in no case for barter or sale; while a municipality may under such a license supply coal to its residents for household use only, which excludes mining coal by a municipality either for its own use or use of its residents other than for household purposes, thus barring factories, stores, heating and lighting plants and other business establishments. [Emphasis added.]

(Circular 679, 47 L.D. 489, 502 (1920)). Under these former regulations, considerable leeway is allowed an individual or association of individuals 4/ in determining the use to which section 8 coal may be put, but such use must satisfy "strictly local domestic needs for fuel."

A situation analogous to appellants' purpose in obtaining section 8 coal, i.e., to generate electricity for mining, is addressed by Mayor, Town of Boonton v. United Water Supply Co., 70 N.J. Eq. 692, 64 A. 1064 (1906). Therein, it is stated that a contract to furnish a town with water "for domestic purposes, the extinguishment of fires, and other lawful uses" and also for "public and domestic uses and purposes of the inhabitants" did not authorize the water company to furnish water for the purpose of creating power for mechanical purposes either by means of the creation of steam or for propelling any water motor to the prejudice of the town for domestic and fire uses.

A careful reading of the implementing regulations at 43 CFR Subpart 3440 reveals further support for the BLM decision on appeal. Regulation 43 CFR 3440.1-3 authorizes a municipality to take coal under a section 8

4/ The application for a license to mine coal lists not only appellants' names as applicants, but also the names of Jack and Barbara Nelson and Dennis and Cheryl Conrad.

license, but limits the disposal of this coal to the residents thereof for household use only. Thus, under this regulation, a municipality may not mine coal for its own use or for nonhousehold uses, such as for factories, stores, other business establishments and heating and lighting plants. 43 CFR 3440.1-3(a). Coal extracted under a section 8 license may not be disposed of by the municipality for profit. 43 CFR 3440.1-3(b).

Similarly, regulation 43 CFR 3440.1-4 authorizes BLM to permit a recognized relief agency to take Government coal and provide it to families for household use. Each family is restricted to the amount of coal actually needed for its own use, but not to exceed 20 tons annually. 43 CFR 3440.1-4(c)(1) and (2).

To construe section 8 as appellants urge is to ignore the Department's longstanding construction of this statute, as set forth in the implementing regulations. BLM properly concluded that appellants' plan to generate electricity for mining purposes did not satisfy domestic needs.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge